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45-324—64—1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (J.S. App. A, pp. 1a–13a) [1] is reported at 229 F. Supp. 572. The report of the Interstate Commerce Commission (J.S. App. C, pp. 15a–69a) is printed at 321 I.C.C. 582; the report of Division 2 (J.S. App. E, pp. 71a–149a) is printed at 318 I.C.C. 641.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325 to set aside an order of the Interstate Commerce Commission (J.S. App. D, p. 70a). The judgment of the three-judge district court (J.S. App. B, p. 14a) was entered on June 4, 1964, and a

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by Arrow Transportation Company, et al.

notice of appeal was filed in that court on July 29, 1964, by the Interstate Commerce Commission.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56.

STATUTES INVOLVED

Section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) reads as follows:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsover; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description.

The National Transportation Policy (49 U.S.C. preceding sections 1, 301, 901, and 1001) and sections 1 (5), 15(7), and 15a(3) of the Interstate Commerce Act (49 U.S.C. 1(5), 15(7), and 15a(3), respectively)

are set forth in Appendix G of the jurisdictional statement filed by Arrow Transportation Company, et al.

QUESTIONS PRESENTED

The Southern Railway System[1] and the other appellee railroads proposed drastically reduced rates on grain, at a level averaging 60% below the pre-existing rates, from certain midwestern river points to destinations in the southeast. The rates were constructed upon a formula containing a 240-cent minimum, applicable for distances up to 346 miles. The Commission concluded that the application of this 240 cent minimum to shippers at Tennessee River points who were substantially closer than 346 miles to the southeast destinations would result in undue prejudice to such shippers and in undue preference of shippers at Mississippi and Ohio River points. The Commission further concluded that the proposed rates, without the minimum and for other reasons would return to Southern only 102% of out-of-pocket costs and would not be adequately compensatory. The Commission directed cancellation of the proposed rates without prejudice to the publication of non-discriminatory rates which return overall 118% of Southern's out-of-pocket costs. The questions presented are:

(1) Whether the court below erred in determining

[1] The Southern Railway System is composed of the six railroads who filed the original complaint in the court below: the Southern Railway; the Cincinnati, New Orleans & Texas Pacific Co.; the Alabama Great Southern Railway Co.; the Georgia Southern & Florida Railroad Co.; the Carolina & Northwestern Railway Co.; and the New Orleans & Northeastern Railroad Co.

independently and as a matter of law that differences in the truck competition encountered by Southern at the preferred and prejudiced points constituted such a dissimilarity in transportation conditions as to preclude a finding that the 240 cent minimum as applied to shippers at the prejudiced points violates Section 3(1) of the Interstate Commerce Act; and whether the lower court, in setting aside the Commission's conclusion that the discriminatory rates violate Section 3(1), improperly shifted the statutory burden of proof.

(2) Whether the lower court erred in overturning the Commission's judgment as to the validity of the car-utilization figure used by Southern in its cost studies, and in setting aside the Commission's ultimate finding that the proposed rates had not been proved to be adequately compensatory.

(3) Whether the court below erroneously construed the Commission's decision as holding that the proposed rates must be increased to avoid unfair and destructive competition to the barge lines, and erred in concluding, on the basis of such erroneous construction, that such holding is in violation of Section 15a (3) of the Act.

(4) Whether the court below erred in substituting its judgment for that of the Commission and in holding that the findings made by the Commission are inadequate and not supported by substantial evidence of record.

(5) Whether the court below exceeded its authority in "permanently enjoining" the orders of the Com-

mission, instead of remanding the case to the Commission for further proceedings.

STATEMENT

This case involves the same drastically reduced rail rates on grain, initially proposed by the Southern Railway System, which were before this Court in *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658. In the *Arrow* case, which was decided while the question of the lawfulness of the rates was still pending before the Commission, this Court held that the courts have no power to restrain new rates from going into effect at the expiration of the statutory suspension period of seven months. Subsequent to the *Arrow* decision, the Commission issued its report and order finding that, although a substantial rate reduction was justified, certain aspects of Southern's proposed rate schedule[1] were unlawful.

The expanding poultry industry in the southeast has, in recent years, accentuated the traditional grain deficit of that area and stimulated the movement of an increasingly large volume of grain from the midwest (J.S. App. C, pp. 26a–29a). Although both the railroads and the barge lines experienced an increase in their grain tonnage, the Commission found that the principal beneficiaries of the increased grain

[1] Although the rates actually went into effect prior to the time the Commission issued its final order, such rates were referred to by the Commission and will be described herein as the proposed rates.

traffic were the unregulated truckers,[4] who transport grain directly from the country elevators in the midwest to the southeastern destinations (*id.*, p. 28a). The stated purpose of Southern's proposed rate reduction was to meet that truck competition. Southern initially published the rates only from selected Ohio and Mississippi River points, and later agreed to publish the same rate schedules from the Tennessee River points.

The proposed schedule, which establishes rates at a level averaging 60% lower than the pre-existing rail rates, was originally published for the account of the Southern Railway System alone. Other railroads serving the southeast[5] later published competitive schedules,[6] but took no position as to whether the rate reduction should be approved. The proposed rates are based on a formula of .573 cents per ton

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[4] Under Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. 303(b)(6), truck transporation of agricultural commodities such as grain is exempt from Commission regulation except as to matters involving the qualification and hours of service of employees and safety standards.

[5] Including, among others, the Louisville and Nashville Railroad Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railroad Company, the Illinois Central Railroad Company, and the St. Louis-San Francisco Railway Company, appellees herein.

[6] The only significant difference in the rate schedule published by Southern and those published by the other railroads is that Southern's schedule would limit the applicability of the reduced rates to multiple-car shipments moving in five of its new jumbo covered hopper cars, while those of the other railroads contemplate multiple-car movements in nine ordinary covered hopper cars or boxcars.

mile, plus 42 cents for terminal services, subject to a 240-cent per ton minimum for all distances up to 346 miles. Upon the protests of numerous parties, including the competing barge lines, grain merchants located at the Tennessee River ports, and the Tennessee Valley Authority, all of the proposed rates were suspended for the statutory seven-month period and placed under investigation.

An exhaustive hearing was held before an examiner of the Commission. The examiner's recommended report was omitted, and on January 31, 1963, Division 2 of the Commission issued its report and order (J. S. App. E, p. 71a–149a). The Division concluded that Southern's proposed rates would be lawful, but that the same rates of the other railroads had not been shown to be lawful. Exceptions were filed by the protestants and by the other railroads, and on July 1, 1963, the entire Commission (with only the 3 members who comprise Division 2 dissenting) issued its final report and order.

The Commission concluded that in view of the rapidly growing volume of grain transported by unregulated truckers at low and unpublished rates a substantial rail rate reduction was warranted, and that such reduction should be approved both as to Southern and as to the other railroads serving the southeast. It noted that the proposed schedules eliminated or sharply curtailed various services[7] normally in-

[7] *I.e.*, under the proposed rates there are no transit privileges; connecting line switching charges are not absorbed; and the amount of free time allowed for loading and unloading of cars is sharply reduced.

cluded in rail grain rates, and that the new jumbo cars which Southern (but not the other railroads) proposed to use would probably result in significant economies (J.S. App. C, p. 39a).

Turning to the contention of the barge lines that the barge-rail routes through the Tennessee River ports were the low-cost mode of transportation, and that the reduced all-rail rates would deprive them of their inherent advantage of low cost in violation of the National Transportation Policy, the Commission found that on the basis of comparative fully distributed costs the barge-rail movements were the low-cost mode by a substantial amount (*id.*, pp. 31a–32a). The Commission concluded, however, that where as here the dominant competition is from an unregulated mode of transportation (*i.e.*, the unregulated truckers), the inherent advantages of competing regulated modes should be evaluated on the basis of comparative out-of-pocket costs, in order to enable at least one of the regulated modes to compete successfully. On the basis of out-of-pocket costs, the Commission found that the all-rail routes were the low-cost mode except as to certain port-to-port movements, and that the reduced rail rates thus did not violate an inherent low-cost advantage of the barge-rail routes (*id.*, pp. 32a–37a).

The Commission then discussed the contention of the barge lines that the proposed rates should be held to be a destructive competitive practice against the barge-rail routes, and found to the contrary (*id.*, p. 38a). As to the limited port-to-port routes of the barge lines alone, where even on an out-of-pocket cost basis

the barge lines are the low-cost mode, the Commission first noted that in view of its conclusion (discussed *infra*) that the drastically reduced rates must in any event be raised slightly in order to render them adequately compensatory, it was unnecessary to determine whether the rates as published would constitute destructive competition as to this limited traffic; and then specifically found that when raised to a minimum reasonable level, the reduced rates would not constitute unfair or destructive competition (*id.*, p. 40a).

The Commission thus "indicated its approval of a broad territorial grain rate adjustment" by the railroads (*id.*, p. 49a). It found, however, that the rate schedules as published were unlawful in two particular respects, and ordered that such unlawfulness be cured. It is the Commission's findings and conclusions on these two points which are at issue before this Court.

The Commission concluded, first, that the proposed rates as published would result in unlawful discrimination against shippers located at the Tennessee River ports, in violation of Section 3(1) of the Act, because of the provision establishing a 240-cent per ton minimum rate, applicable for all distances from 1 to 346 miles. Since the distance between the Ohio and Mississippi River points and the major grain markets in the southeast is substantially more than 346 miles, shippers located at those points would not be affected by the minimum and would receive the full benefit of the rate reduction. The Tennessee River ports, however, are located less than 346 miles from most of those same markets, so that the 240-cent minimum

would in fact be the applicable rate. The practical result is that shippers located at the Tennessee River ports would be charged a far higher rate per mile than their competitors located at the Ohio and Mississippi River points (*id*, pp. 40a–41a). This may be specifically illustrated by comparing the rates to the grain-consuming center of Dalton, Georgia, from Louisville, Kentucky (located on the Ohio River), and Chattanooga, Tennessee (on the Tennessee River). Louisville is located 351 miles from Dalton, and the rate under the proposed schedule would be 243 cents per ton; the rate from Chattanooga, which is located only 37 miles from Dalton, would be the minimum rate of 240 cents per ton.

The Commission found that transportation conditions at the preferred and prejudiced points are not sufficiently dissimilar to warrant the rate disparity. The Commission specifically found that "severe truck competition exists at the Tennessee River ports as well," and noted the long-standing rule that "a carrier may not pick and choose the competition it will meet if the effect thereof is to create undue preference and prejudice" (*id.*, p. 43a). The railroads were thus ordered to amend their rates so as to remove discrimination against shippers located at the Tennessee River ports (*ibid*).

Furthermore, the Commission found that the drastic 60% reduction proposed by Southern would result in rates which are not adequately compensatory. Its conclusion rested primarily upon its rejection of the car-utilization figure used by Southern in its cost computations.

Southern, in its cost studies, had assumed that its jumbo cars would attain a car utilization of 40,000 car miles annually. The Commission concluded, for reasons discussed more fully at pp. 18–19, *infra*, that such a high car-utilization figure was not justified, and determined that in its recomputation of costs the actual data supplied by Southern as to the annual utilization of its regular covered hopper cars should be used. Under the Commission's determination of costs, the proposed rates overall would return to Southern only 102% of out-of-pocket costs (*id.*, p. 49a). The Commission concluded that such a low level of return was inadequately compensatory, but indicated that in its judgment the rates would be adequately compensatory if raised to an overall level reflecting 118% of out-of-pocket costs. The rate level for which the Commission indicated its approval would still be an average of 53% lower than the pre-existing rail rates.

Accordingly, the Commission found the proposed rates not shown to be just and reasonable or otherwise lawful, and directed their cancellation without prejudice to the filing of new schedules in conformity with its conclusions (*id.*, p. 50a).

Southern, joined by various parties who supported the rate reduction, filed suit in the district court to set aside the Commission's order insofar as it requires elimination of the rate discrimination against the Tennessee River ports and cancellation of the proposed rate schedules. The other railroads filed a complaint attacking the Commission's finding of a

Section 3(1) violation but taking no position as to the proper level of rates. The Department of Justice filed an answer taking the position that the proceeding should be remanded to the Commission for additional findings as to the Section 3(1) question. Shippers located at the Tennessee River ports, the competing barge lines, and the Tennessee Valley Authority intervened and appeared in defense of the order. On May 20, 1964, the court rendered its opinion (J.S. App. A, pp. 1a–13a), concluding that the entire rate reduction was valid both as to Southern and as to the other railroads and that the Commission's order should "be permanently suspended, annulled, and enjoined." Its judgment (J.S. App. B, p. 14a) was entered on June 4, 1964. The effect of that judgment is that the full 60% reduction, including the 240-cent minimum, continues in effect both as to the Southern and as to the other railroads, a result which neither the Division nor the Commission had found to be justified.

THE QUESTIONS ARE SUBSTANTIAL

The issues in this case are of the greatest importance, both to grain shippers and to the carriers who compete for the grain traffic. At the time the record before the Commission was made, the annual movement of grain into the southeast was at least 8 million, and probably nearer 10 million tons (J.S. App. C, pp. 27a–28a). Prior to the proposed rate reduction, a substantial portion of that grain traffic moved to the southeast via the Tennessee River ports, and shippers and merchants located there have invested in

extensive grain facilities. The Commission found that the discriminatory rate schedule proposed by Southern would result in "a virtual embargo * * * on traffic moving from the Tennessee River ports to major markets", thus jeopardizing the value of existing grain facilities and conferring a windfall on their competitors located at Ohio and Mississippi River points (*id.*, p. 42a). Furthermore, regardless of whether the proposed rates infringe upon any legal rights of the barge lines, it is clear that, as a practical matter, rates which discriminate against the Tennessee River ports will seriously injure the barge lines serving those ports. We submit, that solely in terms of the economic impact of this case, review by this Court is warranted.

Moreover, we contend that the decision of the lower court is clearly erroneous in major respects.

1. The court below held that differences in the type of motor carrier competition experienced by Southern at the Tennessee River points, on the one hand, and the Ohio and Mississippi River points, on the other, constituted, as a matter of law, such a dissimilarity of transportation conditions as to preclude a finding that the rate disparity violated Section 3(1). In so holding, the court below departed from principles laid down by this Court, thereby improperly substituting its judgment for that of the Commission and diluting the protection against "discrimination in all its forms" which Section 3(1) was intended to provide.

Southern urged before the Commission, as well as before the lower court, that various distinctions between the types of truck competition encountered by it at the Ohio and Mississippi River points and that admittedly encountered by it at the Tennessee River points rendered competitive conditions so dissimilar as to warrant the discrimination in rates. Briefly stated, the distinctions drawn by Southern were that trucks moving from Tennessee River points perform shorter hauls than those from beyond the preferred points because of their closer proximity to the major markets, and that trucks moving from the Tennessee River points allegedly operate, for the most part, with a pay load in only one direction, while those from beyond the preferred points usually have a backhaul. Rejecting the contention, the Commission concluded (J.S. App. C., p. 43a) that:

> No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings. * * *

The Commission's rationale, that neither differences in the type nor relative intensity of competition at the preferred points requires approval of otherwise discriminatory rates, is wholly supported by this Court's decisions. Under Section 3(1), a discrimination in rate treatment can be justified only by a showing of substantial dissimilarity in transportation conditions at the preferred and prejudiced points.

Atchison, T. & S. Fe Ry. Co. v. *United States,* 218 F. Supp. 359, 366 (N.D. Ill., 1963). The competition of motor carriers at the preferred points is a factor which may be considered in determining whether such substantial dissimilarity in transportation conditions exists. *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592 (1949). However, from the beginning, and without departure, this Court in construing Section 3(1) has said only that competition at the preferred points is a factor that may be considered—not one which must control in all circumstances. Thus, in leading *Interstate Commerce Commission* v. *Alabama Midland Ry.,* 168 U.S. 144, 167 (1897), this Court states:

> * * * we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." * * *

Later decisions reiterated that proof of competitive differences does not necessarily justify rate disparity. *Eg., Barringer and Co.* v. *United States,* 319 U.S. 1, 7 (1943); *United States* v. *Illinois Central R. Co.,* 263 U.S. 515, 525 (1924).

Moreover, the record, as reflected in the Commission's findings, indicates a more diffused and pervasive competitive situation at the preferred and prejudiced points than is suggested by Southern's sharp dichotomy between long-haul and short-haul motor competition. The long-distance, back-haul truck movement from the midwestern countryside, relied upon by Southern to justify its rate reduction, necessarily constitutes competition for the railroads at the Tennessee River points as well as at the Ohio and Mississippi River points. The unregulated trucks which Southern proved are the "dominant competition" do not originate at the Ohio and Mississippi River points themselves; they originate instead at country elevators throughout Ohio, Illinois, and Indiana (J. S. App. E, pp. 80a, 88a), and transport the grain all the way to the major markets in the southeast. Insofar as the railroads are concerned, such truck movements constitute competition at all terminal elevators where the railroads might otherwise obtain the shipment—including Chattanooga and other points on the Tennessee River, as well as such points as Memphis and Louisville, located on the Ohio and Mississippi Rivers. This competitive reality not only affords a fortiori support for the Commission's finding of a lack of "substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced," but also illustrates the seriousness of Southern's failure to maintain its burden of proof under Section 15(7)

of the Act that the rate disparity is reasonably related to a dissimilarity of competitive conditions."

In any event, the Court below in concluding independently that there existed such a dissimilarity of competitive conditions at the preferred and prejudiced points as to justify a drastic rate disparity, and in permanently enjoining the Commission's order, departed from the principle enunciated by this Court that "it is for the Commission, not the courts, to say whether [differences in competitive conditions] are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful." *Barringer & Co.* v. *United States, supra*, at p. 7.

The practical effect of the decision below is to virtually emasculate the protection against discrimination heretofore available to shippers and localities under Section 3(1). The prevalence at this time of varying types and degrees of carrier competition at different points would provide, under the decision, justification for widespread rate discrimination wholly without regard to the impact upon shippers. Cf.

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[10] The lower court appears to have improperly shifted the burden of proof to the injured shippers to prove that competitive conditions at the preferred and prejudiced points are similar, in clear contravention of Section 15(7). For example, the lower court reasoned that a finding of a Section 3(1) violation must be supported by findings "of discriminatory rate treatment under substantially similar transportation and competitive conditions" (J.S. App. A, p. 12a), and that "there is no showing" (*id.*, p. 10a) that the long-haul truck competition encountered by the railroads at the preferred points also exists at the Tennessee River ports.

Atchison, T. & S.F. Ry. v. *United States, supra.* A further effect of the decision below is to deny to the Commission any opportunity to approach experimentally, as it did here, the difficult competitive problems created by unregulated motor competition (J.S. App. C, pp. 49a–50a).

2. The lower court also erred in setting aside the Commission's finding that Southern had failed to prove that its drastically reduced rates would be adequately compensatory, as required by Section 1(5).

An important element in determining the cost of providing rail service is the degree of utilization of rail cars. In its cost studies, Southern had estimated that its jumbo cars would attain a car utilization of 40,000 miles annually, as compared with the 20,852 car miles attained annually by its own regular covered hopper cars. The Commission first noted that Southern was proposing a relatively new service in new equipment as to which no significant or reliable experience had yet been gained (*id.*, pp. 47a–48a). In addition, Southern's computations had been based upon two assumptions which, under the Commission's decision, were no longer valid; that reduced rates would not be approved for the other railroads, using ordinary covered hopper cars or boxcars, so that Southern would have a virtual monopoly on the available grain traffic; and that since the rates would be prohibitively high for the short hauls out of the Tennessee River ports, the jumbo cars would be used almost exclusively for the long hauls from the Ohio and Mississippi River points and thus attain a longer

average haul (*id.*, p. 48a). The Commission's conclusion that the same level of rates should be approved for all the respondent railroads, and that the discrimination against the Tennessee River ports was unlawful and must be eliminated, thus undercut the foundation of the high car-utilization figure.[11] In the absence of any reliable data as to the actual car utilization of the jumbo cars, the Commission determined that, in its recomputation of Southern's costs, the data supplied by Southern as to the annual utilization of its regular covered hopper cars should be used, and on the basis of that recomputation of costs found that the proposed rates would return to Southern overall only 102% of out-of-pocket costs (*id.*, p. 49a).[12]

This Court has repeatedly emphasized that the appraisal of cost studies is a matter of judgment which is "peculiarly within the competence of the Commission" (*Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481). The Commission's adjustment of Southern's car-utilization figure reflects an informed and pragmatic judgment which should not be set aside unless shown to be clearly erroneous. At this time we need only point out that if the Commission's finding of a violation of Section 3(1) is sustained by this Court (thereby making the jumbo

[11] The Commission noted further that, even if the 40,000 car-mile figure had been valid, the use made of it by the Division had resulted in a double exclusion of certain "nonapplicable" items of maintenance expense, thus necessitating adjustments in the cost computations (*id.*, pp. 48a–49a).

[12] On an individual basis, the yield would range from 75.89% to 121.82% of out-of-pocket costs. Approximately 32% of the individual rates would be *below* out-of-pocket costs.

car rates available to shippers at the Tennessee River points), its effect upon Southern's utilization of jumbo cars would alone invalidate the lower court's rejection of the Commission's findings as to the non-compensatory character of the rates.

3. The lower court further erred in misconstruing the Commission's decision regarding the issue of unfair and destructive competition. As noted *supra* at pp. 8–9, the Commission, in clear and plain language, *rejected* the contention of the barge lines that the proposed rates would deprive them of an inherent advantage of low costs and thus would constitute unfair and destructive competition. Despite the clear holding of the Commission, the lower court held that "the conclusion of the Interstate Commerce Commission that the proposed rates must be increased in order to avoid unfair and destructive competition * * * is invalid and must be set aside because the conclusion violates Section 15a(3) of the Interstate Commerce Act." (J.S. App. A, p. 13a). Since the Commission reached no such conclusion, the holding of the lower court is clearly in error and should be reversed.

4. Finally, in ordering that the order of the Commission be "permanently enjoined," the lower court misconceived its own function and exceeded its authority as a reviewing court. If there were error in the Commission's decision (which we deny), the proper remedy would have been for the court to remand the case to the Commission for further proceedings, consistent with the opinion of the court. See *Southern Railway Co.* v. *United States*, 376 U.S. 93, 119 (dissenting opinion).

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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